IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION
APPEAL FROM ORDER NO.730 OF 2007

Mrs. Mita Vipul Suchak (Thakkar)..Appellant
(Orig.Applicant-Respondent)

Versus

Mr. Vipul N. Suchak (Thakkar) .. Respondent
(Orig.Opponent-Petitioner)

Shri Madhav J. Jamdar, for the Appellant
Shri Manoj J. Bhatt for the Respondent

CORAM : S.R.SATHE, J.
DATED : 24/09/2007

ORAL ORDER :-

1. The Appellant-original Applicant in Civil Miscellneous Application No.165 of 2007 has preferred this appeal against the order passed by the 3rd Additional District Judge, Thane whereby Applicant's application filed under Order-9 Rule-13 of CPC for setting aside exparte decree of divorse passed against her was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Appellant' and 'Respondent'.

2. The brief facts giving rise to this appeal are as under:-

The marriage of appellant and respondent took place on 07/05/1999 as per the provisions of the Special Marriage Act. Out of the said wedlock the

Appellant gave birth to a male child on 31/07/2000. There were disputes between the Appellant and Respondent and they were not getting on well ultimately on 25/04/2006 Respondent filed Petition for divorse under Section 27, Sub-section-(1)(d)(e) of Special Marriage Act, 1954. The said suit was decreed in favour of respondent-husband exparte on 23/02/2007.

3. It is Appellant's case that she came to know about the said exparte decree on 06/06/2007. She, therefore, filed Miscellneous Application No.165 of 2007 on 03/07/2007 and prayed for setting aside the exparte decree. The Respondent filed his say and admitted that appellant is his wife and they have one son. He also admitted that he filed petition for divorce against the Appellant. However, he contended that notice of the said Petition was properly served on the appellant-wife and as she remained absent matter proceeded exparte against her. The Respondent further contended that when Appellant's brother had filed a complaint before National Commission for Women, he had filed an affidavit and in that he had disclosed about the filing of the divorce petition and as such the Appellant had come to know about the divorce proceedings long back on 23/08/2006. Besides this, he

also contended that he had filed complaint against the Appellant on 24/04/2007 and in that complaint also he had disclosed that decree for divorce was passed against the Appellant. Thus, according to Respondent, Appellant had knowledge about the filing of the Petition as well as decree passed against her. Inspite of the same, she willfully remained absent from the Court and did not take necessary steps in time. Thus, the respondent contended that the Appellant has failed to show any cause much less sufficient cause for setting aside exparte decree. He, therefore, prayed for the dismissal of the application.

4. After hearing the arguments advanced by both the learned Advocates and considering affidavits and documents produced by both the parties the learned 3rd Additional District Judge, Thane came to the conclusion that there was proper service of the notice of the divorce petition on the appellant and she had knowledge about the filing of the said petition but she willfully remained absent in the divorce proceedings. According to him the Appellant failed to show sufficient cause for not appearing in the divorce proceedings. He, therefore, dismissed the application.

5. The above order passed by the learned Additional District Judge is challenged in the present appeal. In this appeal before me, Shri Madhav Jamdar, learned Advocate for the Appellant has urged two points. Firstly, he submitted that there is nothing on record to show that the apellant was properly served with the notice of divorce petition. According to him, the matter wrongly proceeded exparte. Secondly, he canvassed before me that there is also no sufficient material to hold that appellant had come to know about the divorce proceedings and she willfully remained absent in the said proceedings. He, therefore, submitted that the appeal be allowed and the exparte decree be set aside and the Trial Court be directed to decide the Petition on merit after giving due opportunity to both the parties. As against this, Shri Manoj Bhatt, learned Advocate for the Respondent supported the judement and order passed by the learned Trial Judge.

6. The first point which shall have to be decided is whether the Trial Court was justified in proceeding with the Marriage Petition exparte. For that purpose, it is necessary to see Ballief's report. If we see Exh-7 Ballief's report dated 05/06/2006 we find that therein he has mentioned:-

> "रिपोर्ट ऐसाजे - सदरहू नोटीस मधील सामनेवाले सौ. मिता विपूल सूचक (ठककर) रा. 192 दिपक अपार्टमेन्ट येथे समक्ष जाउन स्वत:ची माहितीने तपास करता त्या समक्ष भेटल्या त्यांना नोटीस व सोबतच्या नक्कलेची समज देउन घेण्यास सांगता सदर बाईने जोराजोराने आरडाओरड करुन मी सदरची नोटीस घेणार नाही व सही अथवा अंगठा करणार नाही सदर बाईने आरडाओरड केल्याने शांततेचा भंग होण्याची दाट शक्यता निर्माण झाल्यामुळे सदर बाई समक्ष भेटून घेण्याचे नाकारले मुळे सदर नोटीस राहाते घराचे दरवाजावर डकउन बजावणी करता आली नाही. मे.जा. व्हावे."

From the above mentioned report, it is crystal clear that Ballief had in fact reported that when he went for service of notice Appellant's wife was present and when she was asked to take the notice and the application, she started crying and refused to take

notice and put signature. So, apprehending breach of peace at the said place Ballief could not paste the notice on the door of the Appellant's house. So, bear reading of this report shows that even according to Ballief he could not serve the notice either personally to the Appellant or by pasting it on the door.

Question arises whether under the circumstances, it can be said that there was proper valid service as contemplated by Order-5, Rule-17 of CPC. It would be worthwhile to see what the said order says. It runs as follows :-

> ***"17. Procedure when defendant refuses to accept service, or can not be found -***
> ***Where the defendant or his agent or such other person as aforesaid refuses to sign the aknowledgement, or where the serving officer, after using all due and reasonabel diligence, can not find the defendant, {who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a rreasonable time} and there is no agent***

empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving offdicer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant oridinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed therto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

7. From the above provisions it is quite evident that when the Appellant-wife had refused to accept the notice as mentioned by the ballief it was obligatory on his part to paste the said notice at the door of the Appellant's house. But he has not done so. Hence, I have no hesitation to hold that the provision of Order-

5, Rule-17 was not complied with. So, under such circumstances, it was in fact necessary for the Trial Court to direct fresh service. He could have directed service through post also. Instead of making any fresh attempt for service, the learned Trial Judge wrongly held that there was proper service and therefore the matter proceeded exparte. So, in my opinion, the fact that there was no proper service on the Appellant-wife is in fact sufficient to set aside the exparte decree.

8. Shri Bhatt, learned Advocate for the Respondent argued before me that even if it is held that there was no proper service as contemplated by Order-5, Rule-17 of CPC still then there is material on record to show that the Appellant-wife had knowledge about the Petition filed against her by her husband and as such it was her duty to appear in the said proceedings. According to him, the Appellant-wife willfully remained absent in the said proceedings though she had knowledge about the same and as such there is no justifiable ground to set aside the exparte decree by resorting to Order-9, Rule-13 of CPC. The learned Advocate for the Respondent has drawn my attention particularly to the Bombay Amendment to Order-9, Rule-13 of CPC. It would be worthwhile to see what the said provision says. It

runs as follows :-

> ***" 13. Setting aside decree exparte against defendant – In any case in which a decree is passed exparte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satifies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs payment into Court or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit:***
>
> ***Provided that where the decre is of such a nature that it can not be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also :***
>
> ***Provided also that no such decree shall be set aside merely on the***

grond of irregularity of service of summons, if the Court is satified that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.”

9. In view of the above provisions, it is necessary to find out from the material on record as to whether the Respondent has shown that the Appellant-wife had knowledge about the divorce proceedings initiated by him. It is also necessary to see as to when the Appellant-wife came to know for the first time about the decree passed against her.

10. It is the case of the Respondent-husband that he has filed affidavit before National Commission for Women on 23/08/2006. In that affidavit, he had mentioned about the Marriage Petition filed by him before the District Court, Thane. However, it must be noted that there is nothing on record to show that the present Appellant had come to know about the said affidavit immediately. Similarly, according to him, in the complaint dated 24/04/2007 he had mentioned that

exparte decree has been passed against the present appellant, however, the said complaint is not before this Court and as such one is not in a position to find out whether the present appellant had actually come to know about the contents of the said complaint as alleged by the respondent. So, under the circumstances, there is no material on record which would prima facie establish that the Appellant had knowledge about the filing of divorce petition by the Respondent or she came to know about the exparte decree on 23/02/2007 when the same was passed. So, when the present Appellant-applicant came to know about the exparte decree on 06/06/2007, she has filed the present application under Order-9, Rule-13 within 30 days. Article-123 of the Limitation Act prescribes the period of limitation for filing application under Order-9 Rule-13 of CPC. It is as under :-

Description of application	***Period of limitation***	***Time from which period begins to run***
123. To set aside a decree passed exparte or to re-hear an appeal decreed or heard exparte. Explanation – For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

11. In order to show that there was proper service on the Appellant-wife as per Order-5 Rule-17 of CPC, the learned Advocate for the Respondent has placed reliance on a case **Rishi Kesh Badri Prashad V/s. Kidar Nath Hargu Lal AIR 1957 PUNJAB 38** wherein it is observed that if the process server delivered a copy of the summons and a copy of the plaint to the defendant but the latter declined to sign the other copy of the summons in token of acceptance of service, then it can be held that there was proper service. The facts of the said case and the facts of the case in hand are different. In the instant case, copy of the summons/notice of the divorce petition and the copy of the divorce petition were not actually delivered to the present appellant. While in the above cited ruling, the same were actually delivered but the defendant had not only issued acknowledgement. So, the above cited ruling is of no use to the present respondent. Similarly, in the other case which is relied upon by the learned Advocate for the Respondent, the copy of summons was refused by the defendant and it was taken away by the uncle of the defendant from the process server and the uncle drove the process server away. Thus, the process server was unable to paste copy of the summons on the door of the defendant's house. So, under such peculiar

circumstances in **AIR 1969 AP 67** it was observed that service in such case must be deemed to be proper service. Here the facts are different. So, the above mentioned case is of no use to the Respondent. The learned Advocate for the respondent has placed reliance on a case **M.R. Ved and Company V/s. S.B. Hayeem AIR (3) 1943 BOMBAY 340.** In that case, the defendant had run away with the summons and as such it could not be affixed on the door of the defendant's house. So, it was treated as good service. It must be noted that in the instant case, it is difficult to accept the version of the ballief that he could not paste summons on the door of defendant's house apprehending that there would be breach of peace. Admittedly, the ballief had not drawn any panchanama to show that there was such situation. So, as observed earlier, I have no hesitation to hold that in the instant case there was no proper service on the present Appellant-wife.

12. Shri Jamdar, learned Advocate for the Appellant-wife submitted that in the instant case there is absolutely nothing on record to show that the Appellant was aware of the divorce petition filed by the Respondent. Moreover, she was not also aware of the date of hearing of the said divorce petition. So, the

learned Trial Judge in fact should not have proceeded with the divorce petition exparte. The learned Advocate for the Appellant-wife has placed reliance on a case **Sushil Kumar Sabharwal V/s. Gurpreet Singh and Ors. (2002) 5 Supreme Court Cases 377** wherein it is observed:-

> ***"Court before exercising its discretion of passing ex parte decree must be satified that due service of summons was "proved" - Summons has to be duly served in due time – Date of hearing is significant – Defendant's knowledge about the pendency of the suit does not amount to his knowledge about the date of hearing – Service of summons only on the day preceding the date of hearing shows failure to provide sufficient time to appear and answer the plaintiff's claim – On alleged refusal of the defendant to accept the summons, process server's failure to affix a copy of the summons on the wall of the premises and instead his returning the summons to the court with his endorsement on the back about***

defendant's refusal, amounted to non-service of the summons."

13. So having regard to the above mentioned observations and the facts of the present case it must be held that there was no proper service of notice on the appellant. Besides this, it must be noted that there was dispute between the Appellant and Respondent and both the parties had in fact initiated various proceedings. The Appellant had even initiated action for claiming maintainance from the Respondent. So, considering this aspect it is very difficult to believe that the Appellant was deliberately keeping mum even after coming to know that divorce petition has filed against her. So, preponderance of probabilities also go to suggest that the contention of the Respondent that the Appellant willfully remained absent in the divorce proceedings is not acceptable.

14. In view of the above discussion, I am of the considered view that the learned Additional District Judge has not properly appreciated the material on record and has wrongly held that the Appellant has failed to show sufficient cause for setting aside the exparte decree. On the contrary, having regard to the

facts of the case and with a view that proper opportunity has to be given to the Appellant-wife to put forward her case, it is necessary to set aside the exparte decree of divorce passed against her. Hence, I pass the following order :-

O R D E R

1. The Appeal is allowed.

2. The order passed by the 3rd Additional Sessions Judge Thane in MA-165 of 2007 is set aside.

3. MA-165-2007 is allowed. The Exparte decree passed in Marriage Petitiion No.34 of 2006 by the District Judge, Thane is set aside.

4. The parties to appear before the Trial Court on 15/10/2007. The Appellant to file her written say if any to the Marriage Petition on or before 31/10/2007. The Trial Court to give due opportunity to both the parties to lead their evidence and decide the petition according to law on merits, as expeditiously as possible and in any event within 6 months from today.

5. The Respondent to pay the Appellant costs of this appeal and bear his own.

(S.R.SATHE,J.)